



January 21, 2014

VIA ECF

Magistrate Judge Roanne L. Mann  
United States District Court, Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: Innovation Ventures, LLC v. Ultimate One Distrib. Corp. et al., 12 Civ.5354 (KAM)(RLM)

Dear Judge Mann:

Plunkett Cooney represent Defendants Universal Wholesale, Inc. ("Universal") and Joseph Sevany. We respond to the January 17, 2014 letter from Plaintiffs' Counsel seeking to prevent our clients and all other Defendants still party to this case from taking Plaintiffs' 30(b)(6) deposition. (Dkt#658.)

We join in the sentiments expressed by Counsel for other Defendants in the letters they have filed or are filing this afternoon in opposition to Dkt#658. Like many of the other Defendants, neither Universal nor Mr. Sevany had any knowledge that there was allegedly counterfeit 5-Hour Energy Drink product in the marketplace until *after* Plaintiffs had that knowledge and this lawsuit was filed. Our clients, specifically, did not know there was any alleged issue with product until Plaintiffs' attorneys and agents raided Universal's business premises on November 9, 2012. Moreover, as Capital Sales' letter (Dkt#661) states and as the Seventh Amended Complaint (Dkt #29) expresses at ¶2, the appearance of the alleged counterfeit products and especially its packaging is essentially identical to that of undisputedly genuine, non-counterfeit product and packaging.

Plaintiffs' January 17 letter harps on its status as a victim of counterfeiters and maintains they should not be subjected to an "undue burden" by having to be deposed in this case. However, Plaintiffs *have not produced any 30b6 witness for deposition in this case yet and have not yet been subject to questioning by Counsel for any of the Defendants in this case.* Meanwhile, Counsel for Defendants have duly noticed Plaintiffs' 30b6 deposition and proceeded in coordination in accordance with this Court's order for the deposition to proceed (Dkt#647).<sup>1</sup> Hence, Plaintiffs' request for a "protective order" does not seek to prevent undue burden to Plaintiffs, since no such risk exists. Rather, Plaintiffs seek this Court's endorsement of the latest installment in their efforts to prejudice Defendants' right and ability to defend themselves.

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<sup>1</sup> Universal and Mr. Sevany's Notice for Plaintiffs' 30b6 deposition is **Exhibit 1** to this letter. It was served *before* Dan Dee's Counsel in the California case took a 30b6 deposition of Plaintiffs *in that case*. It incorporates the subjects listed in Quality King Distributing's Notice to avoid duplication in accordance with this Court's Order while preserving my clients' right and ability to depose on these topics should Quality King, whose attorney will lead the deposition, no longer be a party to the case when the deposition proceeds. It then sets forth additional subjects specific in interest to my clients and not included on any other Defendant's Notice.

Review of Plaintiffs' Counsel's procedural maneuverings during the period preceding the filing of their January 17 letter reveals that Plaintiffs actually *waived* the relief they seek therein in order to obtain certain Defendants' stipulation to extend fact discovery. On January 8, 2014, Quality King's Counsel informed Plaintiffs' Counsel that the Defendants had conferred and coordinated in accordance with this Court's Order and determined they will need 3 days for Plaintiffs' 30b6 Deposition in this case.<sup>2</sup> Plaintiffs' Counsel made no objection in response. Then, as the close of fact discovery loomed last week, Plaintiffs' Counsel needed to obtain the stipulations of certain Defendants whose 30b6 depositions Plaintiffs have not taken yet -- including Core-Mark, Purity, Baseline, David Flood, Moa Trading, Capital Sales Company, and Quality King. In order to convince these Defendants to agree to an extension of fact discovery that Plaintiffs sought *in order to take the 30b6 depositions of all of these Defendants*, they affirmatively represented to these Defendants' Counsel and to me<sup>3</sup> that the deposition of Plaintiffs' corporate designee *shall take place* no later than March 7, 2014.<sup>4</sup> Then, Plaintiffs stipulated to this in provision 10 of the Stipulation and Order they submitted to the Court for entry on January 15, 2014. (Dkt#656) The Court granted the relief requested and commemorated in the Stipulation and Order on the afternoon of January 16, 2014. (See docket entry for this date.)

Less than 24 hours after the order was entered formalizing Plaintiffs' stipulation to, indeed, submit its representative(s) for the 30b6 Deposition noticed by Defendants, Plaintiffs filed their letter seeking to have the Court absolve them of their binding obligations pursuant to the stipulation they negotiated with Defense Counsel.

Plaintiffs' January 17 Letter Motion for a "Protective Order" is, in fact, an untimely filed Motion for Reconsideration. On December 18, 2013 the Court entered an Order stating the Court will allow Defendants to conduct Plaintiffs' 30b6 Deposition and that in order to avoid "duplicative

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<sup>2</sup> See **Exhibit 2** to this Letter.

<sup>3</sup> I became included in the communication relating to the correspondence when I became aware it was already in process and pointed out that as Counsel for a party who has noticed Plaintiffs' 30b6 Deposition in this case I needed to be included in any process that includes agreements relative to when and how that Deposition will proceed. In a phone conference on Tuesday, January 14, 2013 Plaintiffs' Counsel affirmatively represented to me and to my Co-Counsel, Megan McKnight, that Plaintiffs will produce representatives for the 30b6 Deposition, that the only reason no date had been set and agreed upon was due to the need to work with Plaintiffs' representative's schedule, and that Plaintiffs "are not seeking special treatment" as compared to the Defendants being subject to 30b6 depositions by the Plaintiffs. These representations are irreconcilable with Plaintiffs' Counsel's January 17, 2014 Letter filing.

<sup>4</sup> Copies of correspondence between Plaintiffs' Counsel and Defendants' Counsel wherein Plaintiffs' Counsel repeatedly affirms that they will produce representatives for their clients' noticed 30b6 deposition are **Exhibit 3** to this letter.

inquiries” Defense Counsel were ordered “to coordinate their efforts and to confer with Plaintiff’s Counsel regarding scheduling.” (Dkt#647.) Defense Counsel did as directed.

In contrast, Plaintiffs’ Counsel:

- 1) allowed the time permitted for filing a Motion for Reconsideration to expire; then
- 2) made no objection when Defendants’ Counsel advised 3 days would be needed for Plaintiffs’ 30b6 Deposition; then
- 3) affirmatively represented to Defendants’ Counsel that Plaintiffs will sit for said 30b6 Deposition in order to obtain certain Defendants’ Stipulation<sup>5</sup> for an extension of fact discovery; and
- 4) *stipulated* to Plaintiffs’ 30b6 deposition proceeding by a date certain and submitted the stipulation and order for entry; and
- 5) *only AFTER* disingenuously obtaining the relief it needed to conduct 30b6 depositions of all of the Defendants, asking the Court to relieve Plaintiffs of their obligations pursuant to stipulation.

Defendants are not seeking to “reopen” Plaintiffs’ 30b6 Deposition. Plaintiffs have not been subject to a 30b6 Deposition in this case. Rather, Defendants seek to hold Plaintiffs accountable to this Court’s order and to their own binding agreement to submit to a 30b6 Deposition. Plaintiff’s request for a protective order is a sham and should be denied.

Respectfully Submitted,

PLUNKETT COONEY

A handwritten signature in black ink, appearing to read 'Chiara', with a long horizontal flourish extending to the right.

Chiara Mattieson

Encl./Attachments

Cc: To all Counsel of Record (Via e-mail)

Open.22666.23502.13664123-1

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<sup>5</sup> or, as with regard to Ms. McKnight and me, to convince us to refrain from objecting to entry of the stipulation and order

# Exhibit 1

Michael J. Barton  
Megan P. McKnight  
Chiara Mattieson  
PLUNKETT COONEY  
38505 Woodward Avenue, Ste. 2000  
Bloomfield Hills, MI 48304  
(248) 901-4000  
Attorneys for Universal Wholesale, Inc.  
and Joseph Sevany

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

_____	X
	:
INNOVATION VENTURES, LLC and LIVING	:
ESSENTIALS, LLC,	:
	: 12 Civ. 5354 (KAM)(RLM)
	:
Plaintiffs,	:
	: <b><u>JOINDER TO QUALITY KING</u></b>
-against-	: <b>DISTRIBUTORS, INC'S AMENDED</b>
	: <b>NOTICE OF DEPOSITION TO</b>
ULTIMATE ONE DISTRIBUTING CORP., ET	: <b>PLAINTIFFS PURSUANT TO RULE</b>
AL.	: <b>30(b)(6)</b>
	:
	: Date: November 1, 2013
Defendants.	: Time: 9:30 AM
_____	X

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

Universal Wholesale, Inc. and Joseph Sevany join Quality King Distributors, Inc.'s Amended Notice of Deposition upon oral examination of plaintiffs Innovation Ventures, LLC; Living Essentials, LLC; and International IP Holdings, LLC (collectively "Plaintiffs") Pursuant to Rule 30(b)(6) dated September 26, 2013. The deposition will be taken before a duly qualified court reporter, beginning on November 1, 2013 at 9:30 AM, at Bienenstock Reporting, 30800 Telegraph Road, Suite 2925, Bingham Farms, Michigan 48025, or such other location as may be mutually convenient. The deposition will continue from day to day until completed, will be recorded by stenographic means, and may be videotaped. You are invited to attend.

Plaintiffs shall designate in writing and produce the officer(s), director(s), managing agent(s) and/or other persons who will testify on its behalf with respect to each of the topics set forth in **Schedule A** attached to Quality King Distributors, Inc.'s Amended Notice of Deposition as well as each of the topics set forth in **Schedule A** attached hereto.

Dated: October 14, 2013  
Bloomfield Hills, Michigan

By:



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Chiara Mattieson  
[cmattieson@plunkettcooney.com](mailto:cmattieson@plunkettcooney.com)  
Michael J. Barton  
Megan P. McKnight  
38505 Woodward Avenue, Suite 2000  
Bloomfield Hills, MI 48304  
(248) 901-4000  
Attorneys for Defendants Universal Wholesale,  
Inc. and Joseph Sevany

## **SCHEDULE A**

### **INSTRUCTIONS AND DEFINITIONS**

1. The definitions and rules of construction set forth in Local Rule 26.3 of the Eastern District of New York are incorporated herein by reference.

2. “Complaint” refers to the Seventh Amended Complaint, filed on or about December 28, 2012.

3. “Plaintiffs,” “You” or “Your” shall include Innovation Ventures, LLC; Living Essentials, LLC; and International IP Holdings, LLC and all of their subsidiaries, affiliates, attorneys, accountants, agents, officers, directors, employees, servants, and any person or entity acting on their behalf.

4. The term “5 Hour Energy®” means the Plaintiffs’ 5 Hour Energy® products (i.e., its liquid, bottles, caps, labels and packaging).

5. The term “Subject 5 Hour Energy®” means the allegedly counterfeit and/or non-genuine 5 Hour Energy® products that any of the defendants are alleged in the Complaint to have bought or sold.

6. The term “Universal customers” means those entities that Universal Wholesale, Inc. (“Universal”) is alleged to have sold the Subject 5 Hour Energy® products.

7. The term “Universal Wholesale, Inc.” (“Universal”) shall include any and all persons you allege to be employees, agents or representatives of Universal with regard to any matter at issue in the Complaint.

8. Unless otherwise indicated, all topics shall concern the time period of November 1, 2010 to the present.

### **TOPICS FOR RULE 30(b)(6) DEPOSITION**

1. All of those topics listed in **Schedule A** attached to Quality King Distributors, Inc.'s Amended Notice of Deposition.

2. Investigations or surveillance of Joseph Sevany ("Sevany") and Universal regarding 5 Hour Energy®.

3. The purchase and sale of 5 Hour Energy® or the Subject 5 Hour Energy® by Universal and Universal Customers.

4. Any profits Plaintiffs claim Sevany or Universal generated by selling Subject 5 Hour Energy®.

5. Any communication of risks or dangers associated with the Subject 5 Hour Energy® to Sevany, Universal or Universal Customers.

6. The basis for the allegations in the Complaint that Universal or Sevany engaged in willful trademark and trade dress infringement.

7. The basis for the allegations in the Complaint that Universal or Sevany engaged in willful copyright infringement.

8. The persons employed by, who are agents for, or are otherwise associated with Plaintiffs that are most knowledgeable as to the claims of willful trademark, trade dress or copyright infringement by Universal or Sevany as alleged in the Complaint.

9. Any information or evidence that any alleged trademark, trade dress or copyright infringement by Universal or Sevany as alleged in the Complaint was not willful.



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

_____	X	
	:	
INNOVATION VENTURES, LLC and LIVING	:	
ESSENTIALS, LLC,	:	12 Civ. 5354 (KAM)
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
ULTIMATE ONE DISTRIBUTING CORP., ET	:	
AL.	:	
	:	
Defendants.	:	
_____	X	

**CERTIFICATE OF SERVICE**

I, CHIARA MATTIESON, do hereby certify that the foregoing **JOINDER TO QUALITY KING DISTRIBUTORS, INC'S AMENDED NOTICE OF DEPOSITION TO PLAINTIFFS PURSUANT TO RULE 30(b)(6) DATED OCTOBER 14, 2013 AND SCHEDULE A THERETO** was this day served by Electronic Transmission (email) address as indicated below:

**Geoffrey Potter, Esq., Christos George Yatrakis, Esq., Michelle Waller Cohen, Esq., Adam Blumenkrantz, Esq., Alexander Michaels, Esq., Thomas Philip Kurland, Esq., Jane Metcalf, Esq., Jonah Moses Knobler, Esq., Jeremy Alexander Weinberg, Esq. Patterson Belknap Webb & Tyler LLP**

Via Electronic Mail: [gpotter@pbwt.com](mailto:gpotter@pbwt.com), [cyatrakis@pbwt.com](mailto:cyatrakis@pbwt.com), [mcohen@pbwt.com](mailto:mcohen@pbwt.com), [amichaels@pbwt.com](mailto:amichaels@pbwt.com), [ablumenkrantz@pbwt.com](mailto:ablumenkrantz@pbwt.com), [tkurland@pbwt.com](mailto:tkurland@pbwt.com), [jmetcalf@pbwt.com](mailto:jmetcalf@pbwt.com), [jweinberg@pbwt.com](mailto:jweinberg@pbwt.com), [jknobler@pbwt.com](mailto:jknobler@pbwt.com)

***Attorneys for Plaintiff, Innovation Ventures, LLC;  
Living Essentials, LLC; and International IP Holdings, LLC***

**Todd D. Greenberg, Esq.**

Addabbo & Greenberg

Via Electronic Mail: [todd@queenslaw.com](mailto:todd@queenslaw.com)

***Attorneys for Ultimate One Distributing Corp., Gulam Najimi a/k/a Ghulamali Ali Najimi, Wally Najimi a/k/a Ahmed Wally Najimi, Price Master Corp., Abdul Satar Najimi***

**Stephen J. Kressel, Esq.**

Kressel & Rothlein, Walsh & Roth LLC

Via Electronic Mail: [skessel@krwrlaw.com](mailto:skessel@krwrlaw.com)

***Attorneys for Excel Wholesale Distributors, Inc. and Farid Tursonzadah a/k/a Farid Turson***

**Randi Wolkenbreit Singer, Esq., Craig Adas, Esq., Jessica Costa, Esq.**

Weil, Gotshal & Manges, LLP

Via Electronic Mail: [randi.singer@weil.com](mailto:randi.singer@weil.com), [craig.adas@weil.com](mailto:craig.adas@weil.com),

[jessica.costa@weil.com](mailto:jessica.costa@weil.com) ***Attorneys for Core-Mark International, Inc.***

**Vincent A. Nagler, Esq., Ryan Bates, Esq., Warren Koster, Esq., Jason Lavery, Esq.**  
Callan, Koster, Brady & Brennan, LLP

Via Electronic Mail: [vnagler@ckbblaw.com](mailto:vnagler@ckbblaw.com), [rbates@ckbblaw.com](mailto:rbates@ckbblaw.com), [wkoster@ckbblaw.com](mailto:wkoster@ckbblaw.com),  
[jlavery@ckbblaw.com](mailto:jlavery@ckbblaw.com)

***Attorneys for Richmond Wholesale Company, Inc. and Saquib Khan***

**Howard J. Shire, Esq., Natasha Sardesai-Grant, Esq.**

Kenyon & Kenyon, LLP

Via Electronic Mail: [hshire@kenyon.com](mailto:hshire@kenyon.com),

[nsardesai@kenyon.com](mailto:nsardesai@kenyon.com) ***Attorneys for CVS Caremark Corp.***

*Arnold J. Hauptman, Esq.*

***Via Electronic Mail: [ajhauptman@aol.com](mailto:ajhauptman@aol.com)***

***Attorneys for 7 Eleven Stores #11152, #25449C-2422, #11181, #32760, #23407***

*Michael Martin, Esq.*

***Martin Law Group***

Via Electronic Mail:

[mm@martinlawgroup.biz](mailto:mm@martinlawgroup.biz) ***Attorneys for***

***Prestige Mobil***

*Hara K. Jacobs, Esq., Sarah Shindler-Williams, Esq.*

***Ballard Spahr LLP***

Via Electronic Mail: [jacobsh@ballardspahr.com](mailto:jacobsh@ballardspahr.com), [schindler-](mailto:schindler-williams@ballardspahr.com)

[williams@ballardspahr.com](mailto:williams@ballardspahr.com) ***Attorneys for Valero Retail Holdings, Inc.***

*Jess M. Berkowitz, Esq.*

***Via Electronic Mail: [jessberkowitzesq@aol.com](mailto:jessberkowitzesq@aol.com)***

***Attorneys for Delta Distribution Services Corp., Sulaiman S. Aamir, Empire Trade Wholesaler Corp.***

*Joseph P. Goldberg, Esq., Jacquelyn Renee Trussell, Esq.*

***Hodgson Russ LLP***

Via Electronic Mail: [jgoldberg@hodgsonruss.com](mailto:jgoldberg@hodgsonruss.com),

[jtrussel@hodgsonruss.com](mailto:jtrussel@hodgsonruss.com) ***Attorneys for Brothers Trading Co., Inc. d/b/a***

***Victory Wholesale Grocers***

**Andre K. Cizmarik, Esq., Anthony J. Viola, Esq., Zachary Winthrop Silverman, Esq.**  
Edwards Wildman Palmer LLP

Via Electronic Mail: [acizmarik@edwardswildman.com](mailto:acizmarik@edwardswildman.com), [aviola@edwardswildman.com](mailto:aviola@edwardswildman.com),  
[zsilverman@edwardswildman.com](mailto:zsilverman@edwardswildman.com)

Attorneys for Quality King Distributors, Inc.

**Richard S. Schurin, Esq., Ariel Samuel Peikes, Esq.**

Gottlieb, Rackman & Reisman, P.C.

Via Electronic Mail: [rschurin@grr.com](mailto:rschurin@grr.com), [apeikes@grr.com](mailto:apeikes@grr.com)

***Attorneys for Baseline Distribution, Inc., David Flood***

Danielle Marie Defilippis, Esq.

**Norris McLaughlin & Marcus, P.A.**

**Anthony R. Paesano, Esq., Brian M. Akkashian, Esq., Richard M. Apkarian, Jr., Esq.,  
Amy Nixon, Esq.**

**Paesano Akkashian, PC**

Gerald Gordinier, Esq.

Via Electronic Mail: [dmdefilippis@nmmlaw.com](mailto:dmdefilippis@nmmlaw.com), [apaesano@apaesanoakkashian.com](mailto:apaesano@apaesanoakkashian.com),  
[bakkashian@paesanoakkashian.com](mailto:bakkashian@paesanoakkashian.com), [rapkarian@paesanoakkashian.com](mailto:rapkarian@paesanoakkashian.com),  
[anixon@paesanoakkashian.com](mailto:anixon@paesanoakkashian.com), [geraldgordinieratty@gmail.com](mailto:geraldgordinieratty@gmail.com)

***Attorneys for Midwest Wholesale Distributors, Justin Shayota, Walid Jamil a/k/a Wally***

***Jamil, JT Wholesale, Inc., Raid Jamil a/k/a Brian Jamil and TriMexico Inc.***

John Y. Ko, Esq.

Via Electronic Mail: [jkccllistlawyer@gmail.com](mailto:jkccllistlawyer@gmail.com)

***Attorneys for Moa Trading, Inc. and David K.  
Lee***

James K. Thome, Esq., Timothy Connaughton, Esq.

**Vandever Garzia, PC**

Brian A. Kalman, Esq.

**London Fischer LLP**

Via Electronic Mail: [jthome@vgpclaw.com](mailto:jthome@vgpclaw.com), [tconnaughton@vgpclaw.com](mailto:tconnaughton@vgpclaw.com),  
[bkalman@londonfischer.com](mailto:bkalman@londonfischer.com)

*Attorneys for Capital Sales Company*

**J. Christopher Jensen, Esq., Bridget Ann Crawford, Esq.**  
Cowan, Liebowitz & Latman, P.C.

Via Electronic Mail: [jcj@cjl.com](mailto:jcj@cjl.com), [bac@cjl.com](mailto:bac@cjl.com)

*Attorneys for Elegant Trading, Inc., Ahmed Bhimani*

Leslie Nizin, Esq.

Via Electronic Mail: [lnizin@aol.com](mailto:lnizin@aol.com)

*Attorneys for Top Choice Trading USA, Inc.*

Bruce M. Sabados, Esq., Gregory Charles Johnson, Esq.

**Katten Muchin Rosenman LLP**

Megan P. McKnight, Esq., Chiara Mattieson, Esq., Michael J. Barton, Esq.

**Plunkett Cooney**

Via Electronic Mail: [bruce.sabados@kattenlaw.com](mailto:bruce.sabados@kattenlaw.com), [gregory.johnson@kattenlaw.com](mailto:gregory.johnson@kattenlaw.com),  
[cmattieson@plunkettcooney.com](mailto:cmattieson@plunkettcooney.com), [mmcknight@plunkettcooney.com](mailto:mmcknight@plunkettcooney.com),  
[mbarton@plunkettcooney.com](mailto:mbarton@plunkettcooney.com) *Attorneys for Universal Wholesale, Inc., Joseph Sevany, Sr.*  
*a/k/a Joe Zaitouna*

**David Benjamin Sunshine, Esq., Elizabeth Nicole Warin, Esq., J. Bruce Maffeo, Esq.**  
Cozen O'Connor

Via Electronic Mail: [dsunshine@cozen.com](mailto:dsunshine@cozen.com), [nwarin@cozen.com](mailto:nwarin@cozen.com),

[jbmaffeo@cozen.com](mailto:jbmaffeo@cozen.com)

*Attorneys for Baja Exporting, LLC and Joseph Shayota*

**David M. Greeley, Esq., Kathryn Quarles, Esq., James R. Thompson, Esq., Gregory A. Vega, Esq.**

Seltzer Caplan McMahon Vitek

Via Electronic Mail: [greeley@scmv.com](mailto:greeley@scmv.com), [quarles@scmv.com](mailto:quarles@scmv.com), [thompson@scmv.com](mailto:thompson@scmv.com), [vega@scmv.com](mailto:vega@scmv.com)

*Attorneys for Joseph Shayota, Tradeway International, Inc. d/b/a Baja Exporting, and Adriana Shayota*

**Brian J. Davis, Esq.**

Via Electronic Mail: [ah@bjdpc.com](mailto:ah@bjdpc.com)

*Attorneys for Shah Distributors, Inc. and Arvind Shah*

**Zachary S. Goldberg, Esq.**

Goldberg, Corwin & Greenberg, LLP

Via Electronic Mail: [zgoldberg@gcgllp.com](mailto:zgoldberg@gcgllp.com)

*Attorneys for Steerforth Trading, Inc. a/k/a Steer Forth Trading, Inc. and Isaac Anzaroot*

**Ronald A. Giller, Esq., Daniel Jason DiMuro, Esq.**

Gordon & Rees LLP

Via Electronic Mail: [rgiller@gordonrees.com](mailto:rgiller@gordonrees.com), [ddimuro@gordonrees.com](mailto:ddimuro@gordonrees.com)

*Attorneys for MCR Innovations and Packaging, Inc., MCR Printing and Packaging Corp., Mario Ramirez, Camilo Ramirez and Naftaunited.com*

**Stanton Lee Phillips, Esq.**

Via Electronic Mail:

[stan@slphillipslaw.com](mailto:stan@slphillipslaw.com) *Attorneys for One*

*Stop Label Corporation*

**Gordon J. Zuiderweg, Esq.**

Law Offices of Barry K. Rothman

Via Electronic Mail: [bkr@bkrlegal.com](mailto:bkr@bkrlegal.com)

*Attorneys for Leslie Roman, Flexopack and Donna Roman*

**Stephen M. Lobbin, Esq.**

The Eclipse Group, LLP

Via Electronic Mail: [sml@eclipsegrp.com](mailto:sml@eclipsegrp.com)

*Attorneys for Juan Romero Gutierrez a/k/a Juan Romero, Advanced Nutraceutical Manufacturing LLC and Nutrition Private Label, Inc.*

**Stanley R. Goodman, Esq; Martin I. Saperstein, Esq.**

Goodman & Saperstein, Esqs.

Via Electronic Mial: [gsesq600@aol.com](mailto:gsesq600@aol.com)

*Attorneys for Food Distributors International, Inc., Scott Tilbrook*

**Rashida A. Khan, Esq.**

Law Offices of William A. Markham, P.C  
Via Electronic Email: [rk@markhamlawfirm.com](mailto:rk@markhamlawfirm.com)  
*Attorney for Kevin Attiq; Dan Dee Company*

Dated: October 14, 2013

Bloomfield Hills, MI

/s/ Chiara Mattieson  
Chiara Mattieson

Open.22666.23502.13366998-1

# Exhibit 2

**Mattieson, Chiara**

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**From:** Cizmarik, Andre <ACizmarik@edwardswildman.com>  
**Sent:** Wednesday, January 08, 2014 3:38 PM  
**To:** Blumenkrantz, Adam (x2781); Potter, Geoffrey (x2050); Yatrakis, Christos G. (x2519) (cyatrakis@pbwt.com)  
**Cc:** 'todd@queenslaw.com'; 'craig.adas@weil.com'; 'randi.singer@weil.com'; 'jessica.costa@weil.com'; 'mark.ribaudo@weil.com'; 'mco.ecf@weil.com'; 'wkoster@ckbblaw.com'; 'jlavery@ckbblaw.com'; 'laveryjason@gmail.com'; 'rbates@ckbblaw.com'; 'vnagler@ckbblaw.com'; 'hshire@kenyon.com'; 'nsardesai@kenyon.com'; 'Ajhauptman@aol.com'; 'jacobsh@ballardspahr.com'; 'rschurin@sternschurin.com'; 'schindlerwilliamss@ballardspahr.com'; 'acizmarik@edwardswildman.com'; 'zsilverman@edwardswildman.com'; 'zwsilverman@gmail.com'; 'aviola@edwardswildman.com'; 'geraldgordinieratty@gmail.com'; 'apaesano@paesanooakkashian.com'; 'anixon@paesanooakkashian.com'; 'bakkashian@paesanooakkashian.com'; 'rapkarian@paesanooakkashian.com'; 'dmdefilippis@nmmlaw.com'; 'rweston@nmmlaw.com'; 'jkccllistlawyer@gmail.com'; 'johnyohanko@gmail.com'; 'jthome@VGpcLAW.com'; 'tconnaughton@VGpcLAW.com'; 'mprentiss@vgpclaw.com'; 'bkalman@londonfischer.com'; 'gsesq600@aol.com'; 'jcj@dll.com'; 'bac@dll.com'; 'ecf@dll.com'; 'mmcknight@plunkettcooney.com'; 'cmattieson@plunkettcooney.com'; 'sintermaggio@plunkettcooney.com'; 'mbarton@plunkettcooney.com'; 'jbehrik@plunkettcooney.com'; 'bruce.sabados@kattenlaw.com'; 'gregory.johnson@kattenlaw.com'; 'gjohnson@law.gwu.edu'; 'zgoldberg@gcgllp.com'; 'sml@eclipsegrp.com'; 'ecm@eclipsegrp.com'; 'rmeegan@eclipsegrp.com'; 'perfumeshower@yahoo.com'; 'steve@elialaw.com'; 'maria@elialaw.com'; 'mg@mauragriffinlaw.com'; 'ah@bjdpc.com'; 'BrianDavis@bjdpc.com'; 'brianjdavisesq@aol.com'; 'irasiegel@earthlink.net'; 'irasiegel1@gmail.com'; 'kcholakian@cholakian.net'; 'cjewell@cholakian.net'; 'lhuerta@cholakian.net'; 'lnicholson@cholakian.net'; 'smack@cholakian.net'; 'quintin@shammamlaw.com'  
**Subject:** RE: Innovation Ventures, LLC, et al v. Ultimate One Distributing Corp., et al; Case No: 12-cv-05354 -- Rule 30(b)(6) deposition of plaintiffs

Counsel:

Defense counsel has conferred and our good-faith estimate is that we will need less than 3 full days for the Rule 30(b)(6) deposition of plaintiffs, although we will endeavor to complete the deposition sooner. QKD will take the lead in the deposition. We have adequate conference space to accommodate everyone at our offices. Please advise who the designee will be and when he will be available to sit for 3 days.

**Andre K. Cizmarik**  
Counsel

Edwards Wildman Palmer LLP  
750 Lexington Avenue  
New York, NY 10022

Direct: +1 212 912 2731  
Fax: +1 888 325 9598



My assistant: Tanya Johnson +1 212 912 2932

[www.edwardswildman.com](http://www.edwardswildman.com)



Edwards Wildman Palmer LLP has offices in Boston, Chicago, Hartford, Hong Kong, Istanbul, London, Los Angeles, Miami, Morristown NJ, New York, Orange County, Providence, Stamford, Tokyo, Washington DC and West Palm Beach. For more information visit [edwardswildman.com](http://edwardswildman.com).

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# Exhibit 3

**Mattieson, Chiara**

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**From:** Blumenkrantz, Adam (x2781) <ablumenkrantz@pbwt.com>  
**Sent:** Wednesday, January 15, 2014 1:55 PM  
**To:** Costa, Jessica; Gsesq600@aol.com; ACizmarik@edwardswildman.com; Singer, Randi; rschurin@sternschurin.com; ZSilverman@edwardswildman.com; jthome@VGpcLAW.com; jko@kolawoffice.com; Mattieson, Chiara; AViola@edwardswildman.com  
**Cc:** Potter, Geoffrey (x2050); Yatrakis, Christos G. (x2519); \_cg LE Team  
**Subject:** Innovation Ventures, LLC, et al. v. Ultimate One Distributing Corp.  
**Attachments:** Stipulation to Extend Discovery Deadlines (1.14.2014).DOC

Dear Counsel,

I have incorporated several date changes proposed by various defendants and attach a new version of the stipulation for your review. As a result of a client conflict and to coordinate the date with other proposed depositions in this case, Living Essentials' 30(b)(6) designee will be available the first week of March for the deposition.

Please let me know if the attached proposal is acceptable.

Best regards,  
Adam

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Adam P. Blumenkrantz  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, NY 10036  
Tel: 212.336.2781  
Fax: 212.336.1289  
Email: [ablumenkrantz@pbwt.com](mailto:ablumenkrantz@pbwt.com)

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